254.26. There are within the state of New Mexico, in excess of 15,664,121 acres of vacant public lands, to which the oil and gas leasing act is applicable.

It is reasonable to assume that large amounts would be received in the future covering production in New Mexico, if the terms of the Leasing Act were carried out by the Secretary instead of being suspended in accordance with the present policy, which is contrary to the intent of Congress in passing the Leasing Act.

Revenue Derived from Taxes on Tangible Property Within the State of New Mexico Used in Operations Under Permits Authorized by the Leasing Bill.

It is estimated that in conducting operations under permits and leases on the public lands within New Mexico, permittees, lessees and operators have expended approximately forty millions of dollars. A vast amount of such money has been invested in personal property used in drilling operations. Such property is subject to tax by the State and produces revenue. The change in policy in the issuing of oil and gas permits has resulted in a burden to this state, because of the loss of revenue from such taxable property.

Employment.

Operations conducted on permits and leases issued under the Leasing Act, provide employment for a vast number of men. The suspension of the act by the Secretary has stopped much of such employment, thus adding to the unemployment situation not only in New Mexico, but in other states as well.

Discretion.

The Secretary of the Interior has no discretion to suspend the Leasing Act. Any discretion given under the Act is to carry out its terms and not to make the act of no effect.

There has been nothing added to the definition of Discretion of an officer upon whom a duty has been imposed by law in over 200 years. The doctrine announced by an English Court is still good law. This is what was reported in 1719:

> "Where anything is left to any person to be done, according to his discretion, the Law intends it must be done with sound discretion and according to law: and this Court hath a Power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them, Trin. 23 Car 1 B. R. for their discretion is not properly discretion, but Folly or Madness, who act things contrary to reason and against Law." 1 Lilly's Practical Register or General Abridgement of the Law, London 1719. (B. R. Bancus Regis or Kings Bench.)

The same doctrine was announced by Chief Justice Marshall about 100 years later in Osborn v. The Bank, 9 Wheaton 866, 6 L. ed. 234:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

Following the doctrine announced in the above quotations, the Supreme Court of the United States has recently defined and limited the discretionary power of the Secretary of the Interior. The leading case on the subject is Daniels v. Wagner, 237 U. S. 547, 59 L. ed. 1102. Chief Justice White, after stating the facts, then said:

> "The claim of discretionary power is substantially this: That in a case where, under an act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation."

The above case was cited with approval by Justice VanDevanter for the Court in Payne v. Central Pacific R. Company, 255 U. S. 236, 65 L. ed. 603, in the following language construing the powers of the Secretary of the Interior:

> "Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress, as manifested in the granting Act."

This last case was recently followed and quoted from by Justice Brandeis in West v. Standard Oil Company, 278 U. S. 220, 73 L. ed. 274, again citing Daniels v. Wagner, in which he said:

> "The broad power of control and supervision conferred upon the Secretary 'does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting Act'."

Great reliance has been placed by appellant on the following paragraph in the oil and gas regulations of March 11, 1920 (page 2, G. L. O. Circular 672):

> "It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and an application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant." (Reg. 2)

It is claimed that this regulation gives the Secretary of the Interior authority to grant or deny prospecting permits at his pleasure. It will be noted, how-

ever, that under this regulation an application may be granted or denied "as the facts may be deemed to warrant." In the permits involved in these cases no attempt was made to ascertain facts peculiar to each case. All applications filed prior to March 13, 1929, were summarily rejected. All applications attempted to be filed after that date were refused without consideration of any of the facts relating to each application. Applications that were made as the result of drawings as provided by the regulations were also summarily denied. The claim is made that the Secretary of the Interior under his discretionary power has authority to suspend the act notwithstanding that the title of it is to "promote" the mining of oil and gas and Section 1 of the Act provides that these and other minerals "shall be subject to *disposition* in the form and manner provided by this Act, etc."

The Secretary of the Interior cannot enlarge by Regulation No. 2 the power given him by Section 13 of the Leasing Act. If he has no discretion to deny the filing of a prospecting permit under the act, he cannot deny the filing because of the Regulation. If there is a conflict between the Leasing Act and the Regulation, the Leasing Act controls.

In People vs. Gage, 155 N. W. 467 (Mich.), it was said:

> "Discretion lodged in the trial court is not a private, arbitrary, or personal, but a legal discretion, to be exercised according to established and well known principles of law."

The whim, opinion, or will of the officer is not the exercise of discretion. It must be an act done under the law which authorized him to act at all. It must be a sound discretion based on law.

In determining whether "authorized" in section 13 of the Leasing Act of February 25, 1920, is directory and gives the Secretary of the Interior discretion to grant or to deny an application for a prospecting permit, it is necessary to ascertain the *intent of Congress* in the passage of the act. In ascertaining that intent, it is necessary to consider the entire act, the changes made in the law as it then existed and the object and purpose of the statute.

As a ground for the granting of writ of certiorari, as set out in Rule 38, paragraph 5 (c) of the Rules of this court, the State of New Mexico says that the Court of Appeals has decided a question of general importance relating to the construction of the Leasing Act of February 25, 1920, which has not been, but should be, settled by this court.

Having thus set forth the interest of the State of New Mexico in this litigation, I adopt Petitioner's brief and respectfully urge that this Honorable Court grant a writ of certiorari to review the decision of the Court of Appeals of the District of Columbia, as prayed for by Petitioner, reverse said decision and direct that a writ of mandamus issue to compel the respondent to receive and file petitioner's application for permit; consider same on its merits and grant a permit under the Act of February 25, 1920.

Respectfully submitted,

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